**APPENDIX A**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed DEC 30, 2005]

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CIVIL ACTION NO. 3:04-CV-1164K

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TIMOTHY K. GREY,
*Plaintiff,*

vs.

DALLAS INDEPENDENT SCHOOL DISTRICT, AND MANUEL VASQUEZ, CEDRIC PORTLEY, DAN CLAXTON, GARY HODGES, LUIS TAMEZ, Individually,
*Defendants.*

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MEMORANDUM OPINION and ORDER

Before the Court is Defendant Dallas Independent School District's ("DISD"), Cedric Portley ("Portley"), Dan Claxton ("Claxton"), Gary Hodges ("Hodges"), and Luis Tamez' ("Tamez") motion for summary judgment. Also before the court is Defendant Manuel Vasquez' ("Vasquez") motion for summary judgment. Because the Court concludes that all of Plaintiff Timothy Grey's ("Grey") claims fail as a matter of law, the Court GRANTS summary judgment for all Defendants on all of Grey's claims.

I. Background Facts

This case arises out of Grey's termination from employment with DISD. Grey worked as a police officer with the Safety and Security Division of the DISD from approximately February 5, 2001 until

August 15, 2002. The primary sequence of events giving rise to this action began in January 2002 when Grey's patrol car privileges were revoked due to the alleged suspension of his driver's license. Grey disputes that his license was ever suspended. Lieutenant Portley and Captain Claxton, also with the DISD Safety and Security Division, requested a meeting with Grey to discuss the status of his driver's license suspension. Grey agreed to the meeting, but requested that an attorney or other witness be present. Shortly thereafter, Chief Vasquez informed Grey that he was being removed from patrol duty and ordered to stay in the headquarters building. Grey alleges that this action was taken because he had requested an attorney.

On February 15, 2002, Grey filed a grievance (the "first grievance") with DISD claiming that Defendants Vasquez, Portley, and Claxton had created a hostile work environment in retaliation for his demand for an attorney. Grey alleges that Vasquez, Portley, and Claxton continued to create a hostile work environment by subjecting him to numerous disciplinary actions in retaliation for the filing of his first grievance.

On April 30, 2002, Grey received a letter from DISD placing him on administrative leave and recommending his termination. Grey claims that this action was also taken in retaliation for the filing of his first grievance. Grey then filed another grievance (the "second grievance") with DISD on May 2, 2002, to appeal the recommendation of termination.

On August 2, 2002, DISD convened an administrative hearing to consider Grey's case. The administrative hearing panel sustained the recommendation to terminate Grey and issued a decision on

August 14, 2002, terminating his employment with DISD. The administrative panel concluded that Grey failed to provide any evidence that DISD had violated district policy or had acted arbitrarily or capriciously. Grey, however, claims that he did not receive his full grievance or appellate rights under DISD policy for either his first or second grievances.

Grey brought this action pro se, but his attorney filed an entry of appearance on August 25, 2005, before Defendants' motions for summary judgment were filed. Although Grey fully responded to the Defendants' motions to dismiss and motion for judgment on the pleadings, he has failed to respond to the Defendants' motions for summary judgment. The Court notes that Grey has failed to come forward with any summary judgment evidence supporting his claims.

## II. Summary Judgment Legal Standard

Summary judgment is appropriate when the pleadings, affidavits and other summary judgment evidence show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party bears the burden of identifying those portions of the record it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 322-25. Once a movant makes a properly supported motion, the burden shifts to the nonmovant to show that summary judgment should not be granted; the nonmovant may not rest upon allegations in the pleadings, but must support the response to the motion with summary judgment evidence showing the existence of a genuine fact issue for trial. *Id.* at 321-25; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

255-57(1986). All evidence and reasonable inferences must be viewed in the light most favorable to the nonmovant. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). However, when no response to the motion for summary judgment is filed, the court may accept the movant's version of the facts as true and grant summary judgment when a prima facie showing for entitlement to judgment is made. *Eversley v. Mbank Dallas*, 843 F.2d 172, 174 (5th Cir.1988).

## III. Grey Failed to Establish a Prima Facie Case for Discrimination under Title VII and §1983

Grey has brought claims for discrimination under 42 U.S.C. § 1983 and under Title VII of the Civil Rights Act, as amended at 42 U.S.C. 2000e et seq. Because Grey has failed to establish a prima facie case of race discrimination in that he has failed to show that he was treated differently than others similarly situated, the Court GRANTS summary judgment for all defendants on Grey's Title VII and § 1983 discrimination claims.

### A. Legal Standard

Discrimination claims brought under § 1983 and Title VII are analyzed under the same evidentiary framework. *See Lawrence v. Univ. of Tex. Med. Branch at Galveston*, 163 F.3d 309, 311 (5th Cir. 1999). In order to prevail on a claim for race discrimination, Grey must establish a prima facie case by showing that he was (1) a member of a protected class; (2) qualified for the position held; (3) subject to an adverse employment action; and (4) treated differently from others similarly situated. *See Abarca v. Metropolitan Transit Authority*, 404 F.3d 938, 941 (5th Cir. 2005). The *McDonnell Douglas* framework requires a plaintiff to first make out a prima facie

case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 (1973). The burden of production then shifts to the defendants to establish legitimate non-discriminatory reasons for their actions. *Patrick v. Ridge*, 394 F.3d 311, 315 (5th Cir. 2004). If the defendant meets this burden of production, the burden of persuasion then shifts back to the plaintiff to demonstrate that there is a material issue of disputed fact as to discrimination. *Id.*

B. Analysis of Grey's Discrimination Claims

Because Grey bears the burden of proof on his discrimination claims, Federal Rule 56 requires him to go beyond the pleadings and designate specific facts showing a genuine issue for trial. *See Celotex*, 477 U.S. at 324. The Court finds that Grey has failed to offer specific facts showing that he was treated differently from others similarly situated. Grey's complaint merely alleges that "DISD had an unwritten official policy of denying Black employees their grievance hearings while granting 'White employees their full procedural protections." Allegations setting forth conclusory facts and conclusions of law, however, are insufficient to survive a motion for summary judgment. *See Galindo v. Precisions Am. Corp.*, 754 F.2d 1212, 1216 (5th Cir. 1985). Significantly, Grey has failed to identify any employee with whom he was similarly situated but treated differently. Without such a showing, Grey cannot establish a prima facie case of discrimination. *See Abarca*, 404 F.3d at 941.

Even if this Court were to conclude that Grey established a prima fade case of discrimination under Title VII and 1983, the Court finds that Defendants have rebutted any presumption of discrimination. Defendants have produced numerous nondiscrimina-

tory reasons for terminating Grey's employment, including several specific instances of insubordination and refusal to comply with orders, inappropriate conduct, failure to follow proper police procedure, the suspension of his driver's license, and unprofessional conduct toward co-workers. These legitimate non-discriminatory reasons offered by Defendants are sufficient to defeat any presumption of discrimination that could have been raised by Grey's pleadings. *See Patrick v. Ridge*, 394 F.3d at 315. Because Grey has not attempted to show that any of these legitimate reasons offered by defendants are a mere pretext, or that race was a motivating factor in his termination, his claims for discrimination must fail. *See id.; Rachid v. Jack in the Box*, 376 F.3d 305, 312 (5th Cir. 2004). The Court therefore GRANTS summary judgment for all Defendants on Grey's Title VII and 1983 discrimination claims.

IV. Grey's Retaliation Claims Fail as a Matter of Law

A. Grey's First Amendment Retaliation Claim Under § 1983

Because Grey's First Amendment claim does not involve a matter of public concern, his retaliation claim under § 1983 fails as a matter of law. In order to establish a First Amendment retaliation claim under §1983, Grey must show that (1) he suffered an adverse employment action; (2) his speech involved a matter of public concern; (3) his interest in commenting on the matter of public concern outweighed DISD's interest in promoting efficiency; and (4) the adverse employment action was motivated by his protected speech. *See Davis v. Dallas Area Rapid Transit*, 383 F.3d 309, 320 (5th Cir. 2004). Because Grey was speaking only as an employee on matters addressing his personal concern, his First Amend-

ment 1983 claim must fail. *See Ayoub v. Texas A &M Univ.*, 927 F.2d 834, 837 (5th Cir. 1991).

This Court concludes that Grey's speech does not protect him from discharge under the First Amendment because his speech focused on his own individual interests rather than a matter of public concern. Matters of public concern include free and open debate about public affairs. *See Connick v. Myers*, 461 U.S. 138, 145 (1983). Speech addressing matters of public concern is entitled to special protection under the First Amendment. *Id.* at 145. Here, Grey is an employee of a public agency, the DISD. Because almost anything that occurs within a public agency could concern the public, this Court must determine whether Grey's speech was made primarily in his role as a citizen or as an employee. *See Ayoub* at 837. Speech made primarily in a public employee's role as a citizen does not address matters of public concern. *Id.*

The plaintiff in *Ayoub*, a professor at Texas A & M University, alleged that he was retaliated against for complaining about the university's discriminatory practice of paying foreign-born professors less than native-born professors. *Ayoub*, 927 F.2d at 835. The Fifth Circuit Court of Appeals held that the plaintiff's speech, which consisted of verbal complaints and the filing of a salary grievance, was not a matter of public concern, because it focused only on his own individual compensation. *Id.* at 837. The Court's holding rested on the conclusion that the plaintiff had spoken as an employee on matters of purely personal interest, rather than as a citizen on matters of public concern. *Id.*

This Court likewise concludes that Grey's speech focused on his own individual interests. Grey's com-

plaint alleges that DISD retaliated against him because (1) he requested the presence of an attorney or other witness during a meeting with Defendants Portley and Claxton, and (2) he filed grievances with DISD. Having considered Grey's request for an attorney and reviewed both grievances filed by Grey, the court finds no evidence that Grey's speech involved a matter of public concern. As in *Ayoub*, Grey's speech, consisting of his attorney request and grievances, focused solely on his own employment conditions and personal interests. Such speech does not protect him from discharge under the First Amendment. *See id.* at 837. The Court therefore GRANTS summary judgment for all Defendants on Grey's First Amendment retaliation claims.

B. Grey's Title VII Retaliation Claim

Because Grey's Complaint does not allege a prima facie retaliation claim under Title VII, his claim fails as a matter of law. To survive summary judgment on a Title VII retaliation claim, Grey must make a prima facie case by showing that (1) he engaged in an activity protected by Title VII, (2) an adverse employment action occurred, and (3) a causal link existed between the protected activity and the adverse action. *See Banks v. E. Baton Rouge Parish Sch. Bd.*, 320 F.3d 570, 575 (5th Cir.2003). Grey has failed to make a prima facie case because he has not alleged that he engaged in an activity protected by Title VII.

Under Title VII, a protected activity is defined as opposition to any practice rendered unlawful by Title VII. *Ackel v. Nat'l Communs., Inc.*, 339 F.3d 376, 385 (5th Cir. 2003). Examples of such opposition include making a charge, testifying, assisting, or participating in any investigation, proceeding, or hearing *under Title VII. Id.* Here, Grey's complaint does not allege

opposition to any practice rendered unlawful by Title VII. In fact, the record contains no evidence that Grey opposed any employment practice on the basis of race, color, religion, sex, or national origin.

Grey's complaint alleges that he received a demotion in retaliation for requesting the presence of an attorney or other witness during a meeting with Defendants Portley and Claxton. Grey's demand for an attorney was to determine whether his driver's license had been suspended and had nothing to do with opposing Title VII discrimination and did not amount to a protected activity under Title VII.

Grey further alleges that his termination from DISD was in retaliation for the filing of his first grievance and for his request for an attorney. Having reviewed both grievances that Grey filed with DISD, the Court finds no evidence that Grey engaged in any protected activity under Title VII. In order to constitute a protected activity, Grey's grievances must at least allege that a Title VII violation occurred. *See Green v. Adm's of Tulane Educ. Fund*, 248 F.3d 642, 657 (5th Cir. 2002). Neither grievance filed by Grey, however, makes any reference to a Title VII violation. Because Grey has offered no evidence that he engaged in any activity protected under Title VII, he has failed to establish a prima facie case for Title VII retaliation. The Court therefore GRANTS summary judgment for DISD on Grey's Title VII retaliation claim.

V. Grey's Fourteenth Amendment Due Process Claims Under § 1983 Fail as a Matter of Law

Grey's Fourteenth Amendment Claims under §1983 fail because he has not alleged a constitutional violation. In order to state a valid claim for a Four-

teenth Amendment violation in a § 1983 action, Grey must show that (1) he was deprived of a liberty or property interest, and (2) he was not given adequate procedural protection with respect to the violation. *See Kelleher v. Flawn*, 761 F.2d 1079, 1086 (5th Cir. 1985). Here, Grey has alleged a deprivation of his liberty interest in his reputation and good name, and a deprivation of his property interest in his employment. Because Grey does not have a constitutionally protected liberty interest in his reputation and good name, or a constitutionally protected property interest in his employment with DISD, the Court GRANTS summary judgment for all defendants on Grey's Fourteenth Amendment due process claims under § 1983.

A. Grey Does Not Have a Protected Liberty Interest in His Reputation or Good Name

Grey alleges that his lack of opportunity to defend his reputation and good name was a denial of due process of law. However, the United States Supreme Court has repeatedly held that injury to reputation is not a constitutionally protected liberty interest. *See Siegert v. Gilley*, 500 U.S. 226, 233 (1991); *Paul v. Davis*, 424 U.S. 693, 708-09 (1976). The plaintiff in *Siegert* received an "extremely unfavorable" credentials report from his defendant supervisor, which resulted in the termination of his federal service employment. *Siegert*, 500 U.S. at 228. The plaintiff alleged that defamatory statements in his credentials review, and the lack of process afforded by the credentialing review, amounted to a violation of his due process rights. *Id.* at 232. The Court relied on *Davis* in holding that the plaintiff did not have a constitutionally protected interest in his reputation. *Id.* at 234. Relying on Siegert and *Davis*, this Court

holds that Grey does not have a protected liberty interest in his reputation and good name as a matter of law.

B. Grey Does not Have a Protected Property Interest in His Employment With DISD

Grey also alleges that his property interest in his employment was taken from him without due process of law. Grey's claim fails, however, because he has not demonstrated that he has a clearly established property interest in his employment. *See Schultea v. Wood*, 27 F.3d 1112, 1116 (5th Cir. 1994), reh'g en banc, 47 F.3d 1427 (5th Cir. 1995). Because Texas is an employment-at-will state, Grey must demonstrate the existence of a specific contract in order to establish a property interest in his employment. *See id.* Although Grey's complaint alleges that he was employed by DISD pursuant to a written employment contract, he has failed to produce any evidence that such a contract existed. Without such evidence, Grey raised no genuine issue of material fact that an employment contract existed nor that he had a protected property interest in his employment. Because Grey has failed to demonstrate a protected liberty or property interest under the Fourteenth Amendment, the Court GRANTS summary judgment for all defendants on Grey's due process claims under §1983.

VI. Grey's Civil Conspiracy Claim Under § 1985

The Court finds that Grey's allegation of civil conspiracy under §1985(3) is wholly without merit. Neither Grey's Complaint, nor his subsequent arguments, set forth any operative facts supporting his conspiracy claim. Grey merely alleges the existence of a conspiracy to deprive him of his civil rights. Such bald assertions, unsupported by operative facts, are

insufficient to support a civil rights conspiracy claim. *See Lynch v. Cannatella*, 810 F.2d 1363, 1370 (5th Cir. 1987). The Court therefore GRANTS summary judgment for all defendants on Grey's civil conspiracy claim under §1985.

VII. Grey's Claims for Breach of Contract and Intentional Interference With a Contract

Grey has also stated claims for breach of contract and intentional interference with a contract. However, as previously stated, Grey has failed to produce any evidence tending to show the existence of a valid contract. The existence of a valid contract is an essential element in a breach of contract claim. *Lewis v. Bank of Am. NA*, 343 F.3d 540, 544-45 (5th Cir. 2003). The existence of a valid contract is also an essential element in a claim for interference with an existing contract. *Prudential Ins. Co. v. Financial Review Servs.*, 29 S.W.3d 74, 77-78 (Tex. 2000). Because Grey has failed to establish a genuine issue of material fact regarding the existence of a valid contract, the Court GRANTS summary judgment for all defendants on Grey's claims for breach of contract and interference with a contract.

VIII. Grey's Claim for Defamation

Finally, Grey brings a state-law defamation claim against defendant Vasquez. Vasquez argues that sovereign immunity shields him from liability arising out of Grey's defamation claim. The Court agrees. Unless waived, sovereign immunity protects the State and its officials from lawsuits arising out of tortious conduct. *See Texas Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2000). Grey's claim against Vasquez in his official capacity is equivalent to a defamation claim against

DISD and fails as a matter of law based on sovereign immunity. *See City of Beaumont v. Bouillion*, 896 S.W.2d 143, 146 n.5 (Tex. 1995). Vasquez has established that these claims are not exempted from sovereign immunity under the Texas Tort Claims Act, and Grey has failed to produce any evidence showing why sovereign immunity does not apply. The Court therefore GRANTS summary judgment for Vasquez on Grey's defamation claim based on sovereign immunity.

## IX. Conclusion

In conclusion, the Court GRANTS summary judgment for Defendants on all of Grey's claims. Grey has failed to establish a prima facie case for discrimination under Title VII or §1983 because he has not shown that he was treated differently from others similarly situated. Grey has also failed to state a prima facie case for First Amendment retaliation under § 1983 because his speech did not address a matter of public concern. His Tide VII retaliation claim fails because he did not engage in any activity protected by Title VII. Grey's claims for violation of due process under the Fourteenth Amendment and § 1983 fail because he has not alleged a violation of constitutionally protected rights, and his §1985 civil conspiracy claims fail because he has not alleged any operative facts to support his claims. Finally, Grey's claims for breach of contract and intentional interference with a contract fail because he has produced no evidence of an existing contract, and his defamation claim fails because sovereign immunity shields Vasquez from liability.

SO ORDERED.

## APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed February 14, 2008]

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No. 06-10779
Summary Calendar

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TIMOTHY GREY,
*Plaintiff - Appellant,*

v.

DALLAS INDEPENDENT SCHOOL DISTRICT; MANUAL VASQUEZ; CEDRIC PORTLEY; DAN CLAXTON; GARY HODGES; LUIZ TAMEZ,
*Defendants - Appellees.*

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Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:04-CV-1164

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Before KING, DAVIS and CLEMENT, *Circuit Judges.*

PER CURIAM:*

Timothy Grey was terminated from his employment as a security officer for the Dallas Independent School District ("DISD"). He sued the DISD and DISD supervisors Manual Vasquez, Cedric Portley,

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* Pursuant to 5TH CIR. R. 47.5, this Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Dan Claxton, Gary Hodges and Luiz Tamez ("the Defendants") under Title VII and 42 U.S.C. § 1983. The district court granted summary judgment in favor of the Defendants and we affirm.

## I. FACTS AND PROCEEDINGS

Grey was hired by DISD as a School Resource Police Officer in 2001. At all relevant times, Vasquez was Chief of DISD Department of Police and Security Services and Portley, Claxton and Hodges were Grey's supervisors. Tamez was DISD's Coordinator of Employee Hearings and Grievances. In January 2002, Portley discovered that Grey's driver's license had been suspended and assigned him to the dispatch office until the license situation was resolved. While this order was in place, Grey rode on patrol with other officers for several shifts. When Portley and Claxton confronted Grey about disobeying their direct order, Grey responded by stating "you want to talk, we can talk to my attorney."[1]

On February 14, 2002, Portley and Claxton met with Grey to notify him that he was under investigation for insubordination for this and other incidents. On February 15, 2002, Grey filed a grievance against Vasquez, Portley and Claxton in which he claimed retaliation, hostile work environment and "despair treatment" for his "free speech" in requesting an attorney. In his first grievance, Grey stated that "Chief Vasquez has a history of practicing retaliatory conduct towards officers who opposed him or speak up for themselves. Vasquez also have [sic] been proven guilty for retaliation by the EEOC." Apart from the reference to the Equal Employment Oppor-

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[1] Grey states that he obtained permission from Vasquez to ride with other officers instead of staying in the dispatch office.

tunity Commission ("EEOC"), nothing in Grey's four page handwritten grievance related to Title VII-type discrimination. Tamez, the DISD administrator with whom the first grievance was filed, did not take any action to investigate the grievance or schedule a hearing. Grey contacted Tamez on March 19, 2002 to find out the status of his first grievance and Tamez told him to take it up with his immediate supervisor, which was in violation of a DISD policy requiring any administrator who received a grievance in error to forward it to the proper administrator and notify the grievant. In August 2002, after Grey had been terminated, Tamez discovered that the first grievance had not been resolved and he scheduled a hearing for Grey before Vasquez. Vasquez denied Grey's grievance on August 29, 2002.

On March 7, 2002, Portley, Claxton and Hodges recommended to Vasquez that Grey be terminated based on his insubordination prior to and during the course of their February 2002 investigation. On April 30, 2002, Vasquez notified Grey in writing that he was recommending termination for reasons which included excessive absences and "[a]cts of insubordination and unprofessional remarks directed towards supervisors." Grey requested and received a hearing before a three-person judicial panel. The hearing took place on August 6-7, 2002. Grey was represented by counsel and presented witnesses and evidence. The judicial panel affirmed Grey's termination in a written order dated August 14, 2002.

Grey filed a charge of discrimination with the EEOC on January 22, 2004. The EEOC determined that "the evidence obtained during the investigation does not establish a violation of [Title VII]."

Grey, initially proceeding *pro se*, filed suit in district court on May 28, 2004. The Defendants filed motions to dismiss and motions for judgment on the pleadings, to which Grey filed responses. On April 4, 2005, five months before the discovery deadline, Grey served interrogatories and requests for production on the Defendants. The DISD complied with his discovery request by producing over 800 pages of business records under Rule 33(d) of the Federal Rules of Civil Procedure. On May 10, 2005, Grey wrote a letter to the court asserting that the discovery provided by the DISD was inadequate and that DISD was not willing to cooperate with him. On August 25, 2005, less than five working days before the discovery deadline, Grey's attorney entered a formal appearance for the first time and noticed the depositions of Vasquez and other DISD personnel. The Defendants filed motions for protective orders and motions to quash his depositions, citing that the discovery deadline was August 31, 2005. On August 31, 2005, Grey filed a motion to compel discovery.

On September 30, 2005, Vasquez filed a motion for summary judgment. On October 27, 2005, DISD filed a motion for summary judgment. Grey never filed a response. On December 30, 2005, the district court granted summary judgment in favor of the Defendants. On the same day, the district court denied as moot Vasquez's motion to dismiss, DISD's motion for judgment on the pleadings, and the Defendants' motions to compel discovery. The district court granted the Defendants' motions for protective orders and motions to quash arising out of the August 2005 discovery dispute. The district court denied Grey's August 31, 2005 motion to compel discovery and found that "the Defendants' responses to Grey's discovery requests have been reasonable and complete."

On January 17, 2006, Grey filed a Rule 59(e) motion to vacate the judgment and attached additional evidence, including affidavits from several of Grey's co-workers. Vasquez filed a motion to strike the additional evidence. On June 14, 2006, the district court denied Grey's motion to vacate on the ground that the evidence he submitted "d[id] not qualify as newly discovered" and denied Vasquez's motion as moot.

Grey now appeals the grant of summary judgment, the denial of his motion to vacate, the denial of his motions to compel and the grant of the Defendants' motions for protective orders.

## II. STANDARDS OF REVIEW

This Court reviews a grant of summary judgment de novo and applies the same criteria as the district court. *Fed. Deposit Ins. Corp. v. Laguarta*, 939 F.2d 1231, 1236 (5th Cir. 1991). As this Court noted in *Little v. Liquid Air Corp.*:

> [T]he party moving for summary judgment must "demonstrate the absence of a genuine issue of material fact," but need not *negate* the elements of the nonmovant's case. If the moving party fails to meet this initial burden, the motion must be denied, regardless of the nonmovant's response. If the movant does, however, meet this burden, the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. . . . We resolve factual controversies in favor of the nonmoving party, but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts. *We do not, however, in the absence of any proof, assume* that *the*

*nonmoving party could or would prove the necessary facts.*

37 F.3d 1069, 1075 (5th Cir. 1994) (internal citations and quotations omitted).

The district court did not consider the materials Grey submitted with his Rule 59(e) motion, so we review the court's order for an abuse of discretion. *Ford Motor Credit Co. v. Bright*, 34 F.3d 322, 324 (5th Cir. 1994).

The district court's discovery rulings are reviewed for abuse of discretion. *Turnage v. Gen. Elec. Co.*, 953 F.2d 206, 208 (5th Cir. 1992).

## III. DISCUSSION

Grey, who is black, alleges that he was discriminated against on the basis of race within the meaning of Title VII, and that the district court's refusal to rule on his motion to compel discovery rendered him unable to prove that he was treated differently from similarly situated employees of other races. Grey alleges that he was retaliated against on the basis of his request for an attorney and his two grievances, and that this violated Title VII's anti-retaliation provisions. Grey argues that his termination violated his liberty interest in his reputation and his property interest in his continued employment with DISD.

Grey did not file a response to the Defendants' motions for summary judgment. "Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment. Nor is it our duty to do so on appeal." *Stults v. Conoco, Inc.*, 76 F.3d 651, 657 (5th Cir. 1996) (internal citations and quotations omitted). Because Grey did not carry his

burden to "designate specific facts showing that there is a genuine issue for trial," summary judgment was appropriate. *Id.* (internal quotations omitted).

A. Title VII Discrimination

To prevail on his Title VII discrimination claim, Grey must establish a prima facie case of discrimination. *Tex. Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). To establish his prima facie case, Grey must show that he is a "(1) a member of a protected class; (2) qualified for the position held; (3) subject to an adverse employment action; and (4) treated differently from others similarly situated." *Abarca v. Metro. Transit Auth.*, 404 F.3d 938, 941 (5th Cir. 2005). Once Grey as the plaintiff establishes his prima facie case,

> the burden shifts to the defendants to articulate some legitimate, nondiscriminatory reason for the employee's rejection. . . . [S]hould the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate rea sons offered by the defendant were not its true reasons, but were a pretext for discrimination.

*Burdine*, 450 U.S. at 253 (internal citations and quotations omitted).

The Defendants admit that Grey meets the first three elements of the prima facie case for discrimination, but they argue that he has not established the fourth element. They also argue that Grey's insubordination and habitual absences created a legitimate, nondiscriminatory reason for his termination. The district court found that Grey failed to establish a prima facie case of discrimination because he did not establish that he was treated differently from

similarly situated employees of other races. The district court also noted that Grey did not attempt to show that the Defendants' legitimate nondiscriminatory reasons for their actions were pretextual. On appeal, Grey admits that he had submitted no summary judgment evidence comparing himself to similarly situated non-blacks. Because Grey failed to establish a prima facie case of race discrimination, we affirm summary judgment as to Grey's Title VII discrimination claim. *Id.*

B. Title VII Retaliation

To establish a claim for Title VII retaliation, Grey "must make a prima facie showing: (1) that [he] engaged in activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that a causal link existed between the protected activity and the adverse action." *Banks v. E. Baton Rouge Parish Sch. Bd.*, 320 F.3d 570, 575 (5th Cir. 2003) (internal quotations omitted). On appeal, Grey claims that he was retaliated against for telling Portley and Claxton that they should speak to his attorney, filing the February 15, 2002 grievance to protest the insubordination investigation, and filing the May 2, 2002 grievance to protest being recommended for termination. The district court found that Grey failed to establish a prima facie case of Title VII retaliation because he did not demonstrate that he engaged in protected activity. Upon review of the record, we affirm.

"Title VII does not require that a plaintiff prove that the conduct opposed was actually in violation of Title VII, but only that a charge was made, or that participation in an investigation of a violation of Title VII occurred." *Green v. Adm'rs of the Tulane Educ. Fund*, 284 F.3d 642, 657 (5th Cir. 2002) *abrogated on*

*other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405, 2412-13 (2006)). Here, Grey failed to prove that he engaged in activities protected under Title VII. Grey's first allegedly protected activity consisted of his statement to his superior officers, "you want to talk, we can talk to my attorney." Grey's second allegedly protected activity, his February 15, 2002 grievance, similarly did not refer to race, but claimed retaliation for "free speech." Grey's May 2, 2002 grievance stated that he was being terminated "strictly in retaliation in which Chief Manny Vasquez has taken out against me because of the grievance I filed for making such retaliatory comments and act of displaying discriminatory practices." In other words, Grey alleged in his second grievance that he was being retaliated against for filing the first grievance. Like the first grievance, the second grievance did not mention race. Both of Grey's formal grievances related to the same initial incident with his superiors, in which there was no mention of race nor any allegation of discrimination. The district court correctly concluded that Grey's retaliation claim failed because he did not show that he opposed activities protected under Title VII. *See Banks*, 320 F.3d at 575.

C. § 1983 Liberty Interest

Grey asserts that his termination violated his Fourteenth Amendment due process rights because he was a public employee "terminated for reasons that were false, publicized and stigmatizing." The district court rejected this claim and held that Grey "did not have a protected liberty interest in his reputation and good name as a matter of law." We affirm. This Court has stated that "mere injury to reputation, even if defamatory, does not constitute

the deprivation of a liberty interest." *Finch v. Fort Bend Indep. Sch. Dist.*, 333 F.3d 555, 561 n.3 (5th Cir. 2003) (rejecting a former school principal's claim of a liberty interest in her good name). The district court correctly rejected Grey's § 1983 liberty claim.

D. § 1983 Property Interest

Grey asserts that he has a protected property interest in his continued employment with DISD and that he was deprived of this interest without due process of law. The district court rejected this claim because Grey failed to demonstrate that he had a protected property interest in his employment. We affirm. Texas is an at-will employment state, and therefore Grey bears the burden of proving the existence of a contract establishing a property interest in his continued employment. *Schultea v. Wood*, 27 F.3d 1112, 1116 (5th Cir. 1994), *reh'g en banc granted*, 47 F.3d 1427 (1995). Grey did not point to any contract which altered his employment at-will status. The Defendants submitted affidavits and DISD policies showing that as support staff, Grey did not have a written contract and was an at-will employee. We find that Grey lacked a protected property interest in his DISD employment and we affirm the district court's grant of summary judgment on Grey's § 1983 property interest claim.

E. Discovery Motions

Grey appeals the district court's discovery rulings. He alleges that the district court abused its discretion by not granting his motions to compel and by quashing his depositions of the Defendants on the same day that it granted summary judgment against him. We find that the district court did not abuse its discretion and we affirm.

With regard to his motion to compel, Grey notes that DISD released hundreds of pages of information from its grievance files but "refused to identify the participants by race." Grey states that without this information, he was unable to establish his Title VII claim of race discrimination. This argument is without merit for a number of reasons, including the fact that Grey could have relied on other evidence (including, for example, co-worker affidavits) to establish a genuine issue of material fact regarding DISD's disparate treatment of black security officers. Instead, Grey chose not to respond to the Defendants' motion for summary judgment. He now bears the consequences of that decision.

In ruling on Grey's motion to compel, the district court found that the DISD's discovery responses were "reasonable and complete." If Grey required further discovery in order to respond to the Defendants' motions for summary judgment, he should have requested a continuance under Rule 56(f). *See Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1285 (5th Cir. 1990). Grey neither filed such a motion nor a response to summary judgment showing why he was entitled to trial.

Even if we accept Grey's contention that additional discovery would have enabled him to prove his Title VII race discrimination claim, we are not required to find that the district court abused its discretion by denying his motion to compel discovery, because it was filed on the day of the discovery deadline after an extensive discovery period. *Turnage v. Gen. Elec. Co.*, 953 F.2d 206, 209 (5th Cir. 1992) (holding that the district court did not abuse its discretion when it denied plaintiffs request to conduct potentially dispositive discovery, "given (i) the imminence of trial,

(ii) the impending discovery deadline, and (iii) [plaintiffs] failure to request an inspection earlier"). The district court did not abuse its discretion when it denied Grey's motion to compel.

Grey also challenges the district court's decision to grant the Defendants' motions to quash and motions for protective orders. His claims are without merit. Granting protective orders because of impending discovery deadlines is not an abuse of discretion. *Id.* Grey noticed the August 29-30, 2005 deposition of two DISD employees on August 26, 2005. The discovery deadline set by the district court was August 31, 2005. The district court did not abuse its discretion when it granted the Defendants' discovery motions.

F. Motion to Vacate

Following the entry of summary judgment, Grey filed a Rule 59(e) motion to vacate. The district court denied the motion. Rule 59(e) motions to vacate or amend a judgment "must clearly establish either a manifest error of law or fact or must present newly discovered evidence." *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990) (internal quotations omitted). The district court correctly stated that the additional evidence Grey appended to his motion to vacate (principally affidavits from Grey's former co-workers) was fully available to Grey at the time of summary judgment. The district court did not abuse its discretion when it denied Grey's motion to vacate, and we affirm.

## IV. CONCLUSION

The opinion and order of the district court granting summary judgment is AFFIRMED.

## APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed MAR 18, 2008]

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No. 06-10779

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TIMOTHY GREY,
*Plaintiff – Appellant,*

v.

DALLAS INDEPENDENT SCHOOL DISTRICT;
MANUAL VASQUEZ; CEDRIC PORTLEY; DAN CLAXTON;
GARY HODGES; LUIZ TAMEZ,
*Defendants – Appellees.*

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Appeal from the United States District Court for the
Northern District of Texas, Dallas

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ON PETITION FOR REHEARING

Before KING, DAVIS and CLEMENT, *Circuit Judges.*

PER CURIAM:

The petition for rehearing is out of time. The court has allowed the filing of the late petition for rehearing. IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

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